No. 3194

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATALIO PENEYRA and NATALIO PENEYRA, an Insane Person, by ADRIANO BORHA, His Guardian Ad Litem,

Appellant,

vs.

THE AMERICAN STEAMSHIP "KINAU," Her Engines, Machinery, Boilers, Tackle, Apparel, Boats, Furniture and Appurtenances, and INTER-ISLAND STEAM NAVIGATION COMPANY, LIMITED, Bailee, Claimant and Owner Thereof,

Appellees.

BRIEF FOR APPELLEE

Upon Appeal from the District Court of the United States for the Territory of Hawaii to the United States Circuit Court of Appeals for the Ninth Circuit.

L. J. WARREN,
SMITH, WARREN & WHITNEY,
Proctors for Appellee.

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THE STATEMENT OF THE CASE

as outlined in appellant's brief purports in the main to recite the allegations of the libel, but with sufficient inaccuracy of result to impel us to allude more particularly to them, as three inconsistent counts, to be borne in mind in following the shifting base of the evidence on the trial.

From the middle of page 3 of appellant's brief the statements should not longer be taken as being from the libel.

The sole issue in this case is that of how the libellant fell into the hold.

The accident occurred on December 19, 1917, and it appears that in January, 1918, (Tr. 137) the libellant was committed as insane, the cause not having been shown; the unsupported claim of Borha, the guardian, being however that it was induced by the fall.

While in the Asylum and with the trial begun and pending both the libellant himself and his guardian applied to the institution superintendent for his examination and discharge (Tr. 136, 140-141), this being a matter apart from the case in court and determinable by the Territorial Insanity Commissioners. After examination by the Commissioners he was by them adjudged sane and his discharge ordered on May 11, 1918 (See libellee's Exhibit 1, Tr. p. 24). The further relevance of the issue of the mental condition of the libellant when he subsequently made his own statements to the trial court will be taken up in connection with the statements themselves.

In Count 1 of the libel (see middle of Tr. p. 9) it is alleged that the libellant "was assisted from said small boat * * * onto the said steamship Kinau and was *taken and placed below the main deck*, * * * and being below the main deck and on the second deck * * * the second officer * * ordered (him) * * to go down into the steerage and then and there *shoved him back* from the side of said steamship and on the second deck thereof, *and* it being dark (*he*) * * *fell* down through an open hatch" (etc.) alleged to have been left unguarded and improperly lighted.

In Count 2 of the libel (at Tr. p. 11), it is claimed in substance that it was the duty of the steamship to have assigned the libellant to that portion of the vessel set aside for first class passengers, instead of which they *"forced"* him and *told him to go* to the steerage quar-

ters, and that in attempting to obey such order he fell into the open hatch.

In Count 3 (at Tr. p. 12) the claim is that libellant was *"ordered and directed"* to go down into the steerage quarters and that they "treated him in a rough and improper manner and *shoved him over towards the hatchway* on the second deck" (etc.), and in attempting to obey he stepped into the open hatch.

Libellant's counsel, in his opening statement to the trial court, said that "the whole thing" was that when libellant went on board "he was ordered by an officer of the vessel to go to the steerage. They made a mistake and thought he was a second class passenger and they *ordered him down to the steerage* and the place was dark and they left a hatch open and they backed him down through the hatchway." (Tr. p. 30).

CLAIMS OF THE LIBELLEE.

The libellee claims that the libellant came out in the small boat accompanied by his little six or seven years old girl and went all the way up the gangway on the starboard side of the steamer to the upper or main deck where first class passengers are carried and where he was entitled to go and remain, passing by on the way up the steerage entrance through the side of the vessel half-way up. Arrived at the upper deck he wanted to locate his baggage, and, not finding it on the upper deck, left his little girl up there while he voluntarily went to the steerage quarters on the next deck below where baggage was being taken in through the side-port or door on the port side of the vessel, this being on the side opposite from the gangway where he had come up. That he there undertook to look down into the hatch, then half-open on its port side next the port-door to receive incoming baggage from a small boat below, and in some

way lost his balance and fell over the chain guard into the hatchway,—all without the notice or knowledge of anyone, so far as known, that he had left the upper deck or come into the steerage, or even that he had fallen, until after his fall. That no fault or negligence of the ship contributed to the accident.

In making this summary of claims we purposely disregard the testimony of one Sanchez, being unable to extend the least credence to his statements, as we shall indicate.

In addition to all of this the libellant himself was brought into court by his counsel at the close of the trial, and the Court, with the initial idea of determining whether the case should longer stand in the name of the guardian ad litem, questioned him to learn his apparent mental condition. The questioning naturally took the direction of inquiry into the matters in dispute, as affording the best opportunity to gauge an opinion. His replies, which appear on Transcript pages 182-185, so satisfied the Court, not only on the point of sanity, but as to the happening of the accident itself, (removing any lingering doubt about it), that the Court deemed the services of a guardian *ad litem* were unnecessary and further dismissed the libel. The findings appear at Transcript pages 186-188.

Libellant's counsel protested all these proceedings and filed separate appeals and separate assignment of errors, attempting to make two separate appeals, one in the guardian's name and one in Peneyra's name. Both are in the record with the separate assignments of errors. We shall treat the appeals as one.

The various assignments of errors are not separately treated in appellant's brief, and our own treatment of such of them as we deem material will be included in our argument.

Because of counsel's insistence that libellant's own statements to the Court were not "testimony" we will first discuss the whole case apart from them, and then show their own importance and application as affording the Court a further means of determining what the truth was.

ARGUMENT.

I. *LIBELLANT VOLUNTARILY WENT TO THE STEERAGE.*

It is clear, even apart from libellant's own statement of the matter, that in boarding the vessel he went first directly to his own proper deck as a first class passenger and was seen there (Tr. 35-36, 44, 45, 80-81, 107,); and took his little girl with him to the same deck (Tr. 35, 44), where he left her sitting on a bench (Tr. 157-158,) on the port side of the upper deck (Tr. 44, 112, 157-158), with a package of matting or mats (Tr. 112, 158). That he looked for his baggage on the upper deck and could not find it (Tr. 45,) and then himself went down to the lower (steerage) deck to look for it (Tr. 35-36).

There is nothing anywhere in the record to support the claim of his having been placed or forced or ordered or shoved to the steerage deck or quarters, or that anyone but himself was responsible for his going or being there. His own witness Henry Aki heard no order of the kind (Tr. 36), nor Cabache (Tr. 52), and no other witness suggested it except libellant's witness Sanchez, whose credibility we challenge throughout.

This development of facts on the trial was apparently recognized by libellant's counsel who then sought, instead, to claim *constructive* force or compulsion in that, the libellant *having come* into the steerage, was *detained* by an alleged order to *remain there* until the purser

should collect his ticket, and, while so remaining, was further ordered to step back out of the way of moving freight, and in so doing fell in the hatch. Testimony to that effect came from one witness only,—Sanchez, (Tr. 63-64, 65), who said that he himself went on board straight into the steerage as a passenger and was there all the time (Tr. 66-67). We urge, however, that Sanchez' testimony is worthless. His story was first to the effect that the second officer (meaning Wailiula the boatswain) told libellant to "go back * * * told him to go right down and he went right straight down and carried his bag with him right where I stayed" (Tr. 62-63, 64.). And yet, throughout all the time covered by Sanchez' own statement the man Wailiula, whom he called the second officer, was *in* the steerage, as was Sanchez himself. Neither could Sanchez in any case have heard any alleged order given to libellant on the upper deck to go down to the steerage, as the decks were as apart from each other as two floors in a flat, and for one to go from the upper to the steerage deck required going down a stairs into a hallway on the lower deck and then turning in an opposite direction along a passageway about 20 feet to a doorway or opening into the steerage (Tr. 58-59). Sanchez himself later inconsistently said that libellant came into the steerage directly from the gangway at the side (Tr. 75-76),—a claim clearly controverted however by the rest of the case that he went upstairs first.

Sanchez further said on the one hand that the second officer told libellant to stay in the steerage until the purser should collect the tickets (Tr. 65), and then that *he, Sanchez,* at the request of the second officer, had in Spanish instructed every man there to that effect, as each one came, including libellant (Tr. 68-69), as he (allegedly) came into the steerage directly from the

gangway on the side of the vessel (Tr. 68, 74-75, 76,) "right where he came on board" (Tr. 76). (On Tr. page 75 the word "hole" should read "hold").

Next, on the point of how libellant fell, Sanchez said first that the *second officer* made a motion and *told Peneyra* to move back (Tr. 62, 63, 64, 65, 70-71), and *then* he said that the second officer was *not* talking *to Peneyra* or any one else except to *Sanchez himself*, asking *Sanchez* to "explain to these boys (Filipinos) who didn't understand that to move back on account might get hurt" (Tr. 71), and that *he* then proceeded to explain it first to every one *except Peneyra* (Tr. 71, 72-73), and *didn't even try* to warn him (Tr. 73), although on his own statement Peneyra was nearest to the hatch (Tr. 71); and that he had "no time" to explain it to Peneyra because Peneyra "was in the hold already" by the time he had explained it to the other boys (Tr. 71).

In other ways Sanchez' testimony does not warrant belief. Once he said Peneyra carried his bag with him (Tr. 63) and then that he didn't have any baggage (Tr. 75). He said once that Peneyra had been upstairs already (Tr. 64) and later that he came straight into the steerage from the side ladder with his baby (Tr. 72, 75) and that the *baby was with him the whole time there in the steerage* until he fell (Tr. 77, and see 72), against which the evidence is overwhelming that the girl was not in the steerage at any time but had been left by libellant on the upper deck (Tr. 35, 44, 112, 158). And certainly it is unlikely that steerage passengers, being in their allotted quarters and having no privilege of going to the upper deck, would be told by the purser or any officer "not to go upstairs *until* the tickets had been collected" (Tr. 65).

The witness Aki, called by libellant, was upstairs be-

fore the accident (Tr. 37), but said he heard nothing said to libellant by any officer (Tr. 36).

Wailiula, in charge of the hatch loading in the steerage at the time (Tr. 82) whom Sanchez thought was the second officer (Tr. 62, 63), denied all knowledge of any order to passengers to stay anywhere on coming aboard (Tr. 86).

Even were it true that libellant, being in the steerage, was ordered to remain there until the taking of tickets or for any other reason, we submit that such could not have been even a remote cause of the later accident,—for even Sanchez said he had *been* there, sitting down, for about fifteen minutes before the accident (Tr. 69). Being in the steerage was not in itself dangerous, and the only effect of having to stay there (if that tale were true) would at most have been a temporary inconvenience.

As to Peneyra's place, where he fell, on Sanchez' story he chose and took it himself, because although told to remain where he was, right where he came inside (Tr. 75-76), he then moved across the ship from the gangway side to the opposite and uncovered side of the hatch on the incoming-freight side, and chose his own position—(so close to it that he, allegedly, fell into the hatch by stepping back only two paces (Tr. 63),—and there stayed (Tr. 75, 77) for about fifteen minutes (Tr. 74, 75).

No witness claimed to have seen the accident except Sanchez. Aki, on the upper deck, did not see what happened (Tr. 36, 37-38), nor did Cabache, who before the accident was also on the upper deck (Tr. 50, 54-55, 56). Both were called by libellant. Wailiula didn't even know that the libellant, as an inidvidual, was there at all until after he had fallen (Tr. 84, 105, 108).

We submit that, as far as known, not a living soul

saw Peneyra's fall, or its cause. Many knew of it immediately *after* he had fallen. Though *Sanchez* said "yes" to the question "did you see the accident?" (Tr. 61), it is quite apparent that his testimony of *how* he fell was by his own deductions merely, because he later said that when the second officer told him "to explain to the rest of the boys," then *"I move outside* and talk to the rest of the boys, and not very long after that I *hear* Peneyra *fall in hatch already* so I didn't finish all my explanation and *I run* to where Peneyra fall down" (Tr. 73).

As we have said before, we are passing, for the present, the statements made to the court by the libellant himself as to how he fell in, and why.

The most that can be said of anything said or done by any officer or employee of the ship is that the boatswain, being ready to have baggage come in through the port door from the small boat below to be immediately placed right in this hatch (Tr. 81, 82) called out and motioned to the people, impersonally, to clear the way (Tr. 83-84).

We submit, therefore, that the only possible issues in the case are, whether or not the hatch was improperly left open and unguarded, and whether the place was so improperly lighted that the open hatch could not easily be seen.

II. *THERE WAS NO NEGLIGENCE OF THE LIBELLEE RESPECTING THE HATCHWAY.*

(1) *The Hatchway was properly open.*

The hatchway was half open, i. e.—half uncovered (Tr. 55, 68)—at the time of the accident. It was properly open, on its port side half, for the purpose of putting baggage into it coming through the port door from the small boat below (Tr. 62, 67, 81-82, 104, 105, 111,

127, 165). The method of handling was to have the baggage first lifted from the small boat onto a plank staging on the side of the vessel about 3 1-2 feet below the open port door (Tr. 82), and from thence passed through the door to the deck within, and again passed into the hatchway (Tr. 82, 111, 119, 127-128). The stage was *not* "above" nor "forward" of the port door, as the interpreter confusedly put it. Reference to Tr. page 120 will show that when the interpreter said "above" and then "forward" Mr. Warren questioned the interpretation, the witness having used the Hawaiian word "malalo" (not malolo) which means "below" or "under," as the Court might readily infer in view of all the other testimony on the point and as determinable by recognition of the fact that if the staging were forward or above the port door the baggage could not be passed into it. This is of little materiality except that it misled the trial judge for a time (Tr. 126-127), and had to be corrected (Tr. 127-128) and it tends to support our contention elsewhere stated that the interpretation was faulty (See also the partial failure to interpret, challenged and admitted, Tr. p. 105), which we think is largely responsible for the mix-up concerning the *time* of the scolding referred to by Wailiula referred to on page 11 of this brief.

(2) *The Hatchway was properly guarded.*

Libellant's counsel does not urge in his brief on this appeal, as he did at the trial, that after the accident one of the ship's officers told Wailiula it was his fault because he had left the *hatch open.* We wish, however, to anticipate such a claim because we challenge it.

Libellant's witness Aki testified that after the accident the first officer (Otterson) told Wailiula it was the

fault of the boatswain for not *covering up* the hatch (Tr. 41, 42). Cabache said it was because for *not closing* the hatch (Tr. 51). Sanchez didn't even mention it,—and it would have been real grist for his mill had he but heard it or even heard of it.

It does not appear that *prior* to the accident Otterson had come into the steerage and seen the guard chains down, for which he reprimanded the boatswain and ordered them up, which order was carried out (Tr. 97, 160). In discussing this point, we maintain that even if such a statement had been made as claimed it would be incompetent, and while the trial court so ruled or was inclined so to rule (Tr. 41, 42), evidence of the kind was heard (Tr. 51) on counsel's plea that the ruling be reserved. It could not be regarded as part of the *res gestae* or binding on the owners of the vessel because it was not made (if made) until sufficient time had passed after the accident to get the man out of the hatchway and down into the small boat (Tr. 58), which necessitated his being first lifted down onto the staging (Tr. 111). It was too remote in point of time,—perhaps two or three minutes (Tr. 58) or not quite five minutes (Tr. 87) after the accident.

Wailiula's own account of it was confused at first, when he said he had been "scolded" after the accident for "not looking after the hatch" (Tr. 91), but he finally clearly stated on further direct (Tr. 94, 97-98) and cross-examination (Tr. 98, 99, 102) that the scolding was before the accident and that in consequence the chains were put up and were up at the time of the accident (Tr. 97, 98, 102, 107-108). As regards the real or apparent confusion of this witness we submit that the Hawaiian interpretation was poor,—a difficult matter to challenge on an appeal record but of which at least two examples appear, detected even by counsel

having but little knowledge of the language (Tr. 105, 120). See page 10 of this brief.

Otterson, an intelligent man, speaking English, clarified the whole matter. When the accident happened he was standing at the head of the gangway (on the upper deck) receiving incoming passengers (Tr. 157), and on hearing of it went below (Tr. 158). *Prior* to that, between incoming boats, he had left his post and gone into the steerage minutes *before* the accident (Tr. 158-159) and on then seeing no chains were around the hatch gave the boatswain a calling down and ordered them up (Tr. 160), giving as the reason that the steerage passengers otherwise would make their beds on top of the hatch and would have to be gotten off before freight could be put into the hold (Tr. 160), and that he had gone there again a little later, still before the accident, and found them up (Tr. 161). *After* the accident, when he came down he saw the guard had been taken down on the port side (Tr. 162, 165). He then only asked Wailiula how it happened (Tr. 162-163). The very claim that the reprimand was for "not covering the hatch up" (Tr. 42, 51) should show its improbability, because they were at that very time about to put baggage into it, and it had to be open.

There was some testimony for the libellant that the hatch was unguarded. (See "hatch *open*", Tr. 38; and "left open", Tr. 43; and Tr. 48). However, this testimony came from the witness Henry Aki, who was a first class passenger and was on the upper deck until called downstairs after the accident (Tr. 37) and who certainly could not say what conditions were at the time of or prior to the accident.

Even Sanchez only said "one side" was open (Tr. 70).

On the other hand the testimony for the libellee is

positive that at the time of the accident the guards were around the hatch (Tr. 98, 102, 117, 118, 124, 159, 160, 161), one side being guarded by the wall of the ice room (Tr. 103), and on the port side of the hatch, nearest the port-door, the guard was a rope (Tr. 161) which had been taken down to admit of baggage being transferred into the hatch on that side from the port door. (Tr. 83, 103, 161, 165).

Of course as soon as loading is finished the hatch covers are all put on.

(3) *There was sufficient light.*

If, under the circumstances of working at this hatch, there was sufficient light by which the condition of the hatch and what was going on were obvious, it could not be the fault of the libellee that libellant fell in.

The testimony of the witnesses, even on the side of libellant alone, as to the time of day the accident happended, covers a remarkable range of guesses. It should be granted, however, that Hawaiians are more accustomed to note natural phœnomena than to consult a watch.

Of course, on the libellant's side, things were "dark". Aki went too far by saying it was so dark the passengers could not even see the hatch,—i. e.—see that a hatch was there (Tr. 36), or whether it was closed or not (Tr. 60-61). Cabache said "kind of dim; more dark than light" (Tr. 52). Sanchez' statement, "awful dark" (Tr. 64), is characteristic of his whole testimony.

As to the ordinary amount of light outside on a clear day (which we will connect with the inside) at any given hour, the Court will take judicial notice of natural facts, and, therefore (as appears by any almanac

for Hawaii), that the time of sunset on December 19th, 1917, was twenty-two minutes after five o'clock.

Libellant's witness Aki said the accident happened between six and seven o'clock (Tr. 35), at which hour it certainly must have been dark (the twilight in Hawaii is short) and lights would certainly have been in evidence, for certainly the deck would not be left unlighted when operations had to be carried on.

Libellee's witnesses put it variously.

Wailiula, the boatswain, said between three and half past three in the afternoon (Tr. 100, 101); but we think he was merely making an approximate deduction in view of the fact, as he said before, that at about the time of accident he could still see the sun, which he said very positively was still visible "directly above the Pali" (Tr. 86),—"pali" being the Hawaiian word for any precipitous wall or slope,—and he had reference to one of the hills about Nawiliwili Bay in which the vessel was at anchor "some considerable distance from the beach" (Tr. 87). We submit he was right about it being near sunset but in error as to his guess of the hour. This will more clearly appear when we note that if, as Otterson said, the injured man was sent ashore at about 5:30, according to the quartermaster's time, and the accident was at least five minutes before that (Tr. 163, and see 164), then, with sunset due at 5:22, it really happened at about sunset or slightly before.

Kui's testimony indicates that the sun was still lighting the Pali (Tr. 114). He put the time merely as between five and six (Tr. 115). Palis are on both sides of the bay (Tr. 114), and Kui was speaking of the pali on the east side of the vessel being lit up by the sun from over the pali on her west side,—while Wailiula had reference to the sun being over the pali on the vessel's west side.

Aika said the sun was up high and put the hour as between three and four o'clock (Tr. 117)—another Hawaiian guess.

Pua Ku guessed the time as between five and half past (Tr. 129).

Captain Gregory, not assuming to state positively, said about half past or twenty minutes past five (Tr. 150), and it will be conceded that it should be the captain's business to know, which we submit was likely when his sailing was already delayed after five and he must have been anxious to get away.

Kamaiopili, the purser, also said between five and five-thirty (Tr. 152).

Here we indicate that the light inside the vessel at this hatchway was scarcely less than outside. The hatch itself is but a few feet directly inside of and opposite the open double port doors (Tr. 100), and distant about ten feet (Tr. 84, 89-90, 98). The doors were open at the time (Tr. 60, 88, 113, 118, 153) and the opening was ample to admit light not only directly on the hatchway but throughout this steerage deck except back in its end beyond the ice room (Tr. 89). By the somewhat varying judgment of the witnesses these doors were no less than 5 by 6 feet (Tr. 100, 113), and were otherwise mentioned as being large (Tr. 88), about a man's height (Tr. 88, 118).

Aside from the hour, the evidence is very generally to the effect that even in the steerage quarters it was *light* (Tr. 87, 89, 101, 112, 113, 114, 117, 128, 149, 153).

This is strongly supported by the testimony of both the captain and purser, to the effect that when the injured man arrived ashore after the accident the purser was there working on his lists inside the ticket office, by a small window, not opening west, where he saw

well enough to do his checking and writing without any artificial light (Tr. 149, 151-153, 156). Even after the man had then been sent to the hospital, and the freight clerk had returned from that mission, a half hour afterwards, it was still light, and still fairly light at least when all had again boarded the vessel. (Tr. 152-153).

III. *PENEYRA HIMSELF CORROBORATES OUR CASE.*

The libel in this case shows that on the *ex parte* application of Borha, who filed suit in the name of Peneyra, the Court made an order appointing Borha guardian *ad litem* in the suit, in view, solely, of the allegations made that Peneyra was then insane.

It is true that on the trial Borha offered in evidence (as Exhibit A, Tr. p. 23) a copy of certain letters of guardianship issued to him, referring to Peneyra as an insane person; but this at best made out no more than a *prima facie* or presumptive case of insanity, with no proof of cause, and subject to its being overcome by proof of subsequent recovery, and, unfortunately for his own case, Borha put on medical witnesses who by their testimony as to the subsequent mental condition of Peneyra *did* overcome the merely legal presumption of continuance of insanity, and dispersed it, —for they pronounced him recovered (Tr. 131, 132, 136, 138, 139),—it being admitted that a third of libellant's own medical witnesses, Dr. Michaels, would similarly testify if called (Tr. 142). In fact Borha himself, who had made only *one* visit to Peneyra at the Asylum, a week before the trial (Tr. 31) testified as to his conversation with him on that occasion, which we think shows nothing inconsistent with Peneyra's sanity (Tr. 32-34). He was all right

enough to want to be assured as to the care of his money and his little girl (Tr. 32, 34).

As that was Borha's only visit there, it was on that occasion, according to Dr. Schwallie's testimony, that he said Peneyra was all right and joined with Peneyra in asking for his examination so that he might be discharged (Tr. 136, 140-141). Further, the libellee produced a certificate showing Peneyra's legal restoration to sanity *as well as* his discharge from the Asylum (Tr. p. 24).

The sole legal authority under the laws of Hawaii concerning the examination and determination of sanity and the discharge of inmates of the Insane Asylum, is vested in the Territorial Commissioners of Insanity under Sections 1088 and 1091 of the Revised Laws of Hawaii, 1915, as follows:

> *Sec.* 1088. *Discharge from Asylum.* Any person committed to the Insane Asylum may upon application being made by a sheriff, deputy sheriff or by a relative of such person, and notice given to the superintendent of the Insane Asylum, or upon application by the superintendent, be examined by the commissioners as to his or her sanity, and if a majority of said commissioners shall be satisfied that such person is of sound mind or is not dangerous to the public safety, they shall so certify to the superintendent of the asylum, and such person shall be forthwith released from custody."
>
> "*Sec.* 1091. *All commitments and discharges under this chapter.* No person shall be committed to the insane asylum or be discharged therefrom except as herein provided."

In certifying that upon their examination of the patient and the record of his case before them they were "satisfied that said patient is now sane" (Tr.

24) they expressed their decision under the terms of the statute, as the legal ground for his discharge, and we submit this thereby restored the *legal* capacity of Peneyra.

It is true that this action occurred on May 3rd, after the trial had begun and before its conclusion, but it also appears that the Commissioners then acted at the request of Borha and of Peneyra himself. (Tr. 136, 140-141).

This naturally resulted in making Peneyra himself a competent witness, and we submit that his answers, appearing on Transcript pages 182-186, apart even from other evidence of his recovery, show conclusively *how the accident happened,* and sustained with practically no variance, every theory and feature of the defense theretofore presented.

The conclusion of the Court is concisely expressed in the opinion at pages 186-188 of the Transcript.

Appellant's counsel insists the court should not have considered any statement of Peneyra,—"only two days out of the Asylum", and that the Court improperly dismissed the guardian *ad litem.*

Yet the court questioned Peneyra at the express request of his counsel (see Opinion, Tr. page 186).

The Court had the same right to dismiss as to appoint the guardian *ad litem.*

IV. ISSUES OF LAW.

To the contention that libellee must pay in this case because the defense of contributory negligence was not specifically pleaded, we say first that where the libel alleges specific negligence and it fails of proof, the libellee is not put to further defense nor bound to explain the accident, and, further, that where the answer makes out a case that libellee has no knowledge

whatever as to how the accident occurred, or what occasioned it, it is not bound to allege and prove facts manifestly beyond its knowledge to support a claim of contributory negligence. We submit that there is no rule or fiction of law which will require a litigant to make allegations of fact outside of his knowledge and be obligated further to prove them, for, we take it, if allegations of contributory negligence are necessary then affirmative proof of them is necessary.

Libellant's counsel invokes the doctrine of *res ipsa loquitur* (brief page 13), to which we reply that this has no application in this case because specific tart was pleaded (ordering, shoving, etc. of libellant into the steerage and into the hatchway), and specific negligence alleged (leaving the hatch open and unguarded and unlighted), as appears on Transcript pages 9-12.

Hutchins v. "Great Northern," decided in Ninth Circuit Court of Appeals, July 1, 1918. (Case No. 3084).

We submit, on our part, that the libellant has fallen far short of the requirement that he prove his case by a preponderance of the evidence. The trial judge, upon the conflicting testimony, entertained no doubt which was entitled to credit.

Where a plaintiff fails to make out a cause of action, the defendant is under no necessity either of pleading or proving contributory negligence.

That the decree should be affirmed, is respectfully submitted.

L. J. WARREN,
SMITH, WARREN & WHITNEY,
Proctors for Appellee.

Dated, Honolulu, Hawaii, January 22, 1919.

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